(16,817.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 604.

CHARLES E. BOLLES, PLAINTIFF IN ERROR,

vs.

THE OUTING COMPANY, LIMITED.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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a United States Circuit Court of Appeals for the Second Circuit.

CHARLES E. BOLLES, Plaintiff in Error,
vs.
THE OUTING COMPANY, LIMITED, Defendant in Error.

Transcript of Record.

Error to the circuit court of the United States for the southern district of New York.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Charles E. Bolles, plaintiff, and The Outing Company, Limited, defendant, a manifest error hath happened, to the great damage of the said Charles E. Bolles, as is said and appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the United States circuit court of appeals for the second circuit of the city of New York, together with this writ, so that you have the same at the said place, before the judges aforesaid, on the 26 day of April, 1897, that, the record and proceedings aforesaid being inspected, the said judges of the United States circuit court of appeals for the second circuit may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 21 day of April,
2 in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and —.

JOHN A. SHIELDS,
[SEAL.] *Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the* Southern *Circuit.*

The foregoing writ is hereby allowed.
N. Y., April 21, 1897.
E. H. LACOMBE,
Judge U. S. C. C.

UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify, that the following pages, numbered from 1 to 55 inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of Charles E. Bolles, plaintiff in error, against The Outing Company, Limited, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed at the city of New York, in the second circuit, this 21 day of April, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and —.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

3 Due and timely service of the within writ of error is admitted.

Dated New York, April 21, 1897.

JOHN R. ABNEY,
Att'y for Defendant in Error, Outing Co., Limited.

(Endorsed:) U. S. circuit court of appeals for second circuit. Charles E. Bolles, pl'ff in error, *v.* The Outing Company, Limited, def't in error. Writ of error. Wells, Waldo & Snedeker, attorneys for plaintiff in error, Mutual Life building, 34 Nassau street, New York. U. S. circuit court. Filed Apr. 21, 1897. John A. Shields, clerk.

United States Circuit Court for the Southern District of New York.

CHARLES E. BOLLES, Plaintiff,
against
THE OUTING COMPANY, LIMITED, Defendant. }

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of
4 the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, at the city of New York, this 18th day of April, in the year one thousand eight hundred and ninety-four.

[L. S.] JOHN A. SHIELDS, *Clerk.*

WELLS, WALDO & SNEDEKER,
Plaintiff's Attorneys.

Office and post-office address, 34 Nassau street, New York city.

Circuit Court of the United States for the Southern District of New York, in the Second Circuit, at the April Term, 1894.

CHARLES E. BOLLES, Plaintiff,
against
THE OUTING COMPANY, LIMITED, Defendant.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Charles E. Bolles, a citizen of the United States and a resident of the State of New York, within the city of Brooklyn, in the
5 United States, the plaintiff in this action, by Wells, Waldo & Snedeker, his attorneys, complains of The Outing Company, Limited, a corporation organized under the laws of the State of New York, carrying on its business and having its principal place of business in the said city of New York, and within the southern district of New York, defendant in this action, as follows, to wit:

The plaintiff says, upon information and belief, that The Outing Company, Limited, the defendant, is a corporation organized under the laws of the State of New York, carrying on its business in the city and county of New York, in the southern district of New York, and that its business is the publication of a certain pamphlet or monthly magazine, known by the name of *Outing*, and the publishing of other pamphlets, magazines and papers within the said city and county of New York.

For a first cause of action plaintiff says:

Firstly. That for many years prior to and at and since the times mentioned in this complaint, the plaintiff resided in and carried on business in the city of Brooklyn, county of Kings and State of New York, in the United States, said business being that of a photographer, and that he is and was well and favorably known in such business, and that said business was and is carried on and was and is known by the name of "Bolles," which is the plaintiff's business name, it being now and having been for many years a general custom in the photographic business, with persons carrying on the same, to use their surnames alone.

That heretofore and in or about the month of August, 1893, the plaintiff made, invented and designed a certain photograph and the negative thereof from a certain ship or sloop yacht, known
6 by the name of the *Vigilant*, at and within the said southern district of New York, and within the eastern district of New York, and that the same is the photograph hereinafter referred to, and that the title of said photograph is "Vigilant No. 4," being the number used to designate this particular photograph, and that a copy of said photograph, marked "Exhibit A, 1894," is hereto annexed and made a part of this complaint.

Secondly. And this plaintiff further says that the said photograph, the title of which is the "Vigilant No. 4," and which is the subject of this suit, is a new, useful, harmonious, characteristic and spirited picture, and that the same is the original invention and design of this plaintiff, for the reason that it was made by this plaintiff entirely from his own original selection and conception, to which he

gave visible form by selecting the moment when the outline of the said yacht, the light, shade, background and poise of said yacht combined to make a harmonious, characteristic and spirited picture, and selecting and choosing such conjunction of conditions through the means of a tugboat under his (plaintiff's) sole direction and control, and from such selection, choice and arrangement, made entirely by plaintiff, produced the picture which is the subject of this suit, and that the terms "author," "inventor," and "designer," as used in this complaint and in the art of photography, mean the person who so produces the photograph.

Thirdly. The plaintiff further showeth that he is the author, inventor, designer and proprietor of the certain photograph and negative thereof, the title or description of which is "Vigilant No. 4," and, being such author, inventor, designer and proprietor, and being a citizen of the United States, and desiring to obtain the copyright for the same, in conformity with the provisions of the Revised Statutes of the United States, this plaintiff, on the ninth day
7 of August, 1893, and before the publication thereof, did deposit in the mail within the United States, to wit, in the general post-office in the city of Brooklyn, in the State of New York, enclosed in a postpaid wrapper, directed to the Librarian of Congress, Washington, D. C., a printed copy of the title of said book or other article, to wit, of the said photograph, in the following words, to wit, "Vigilant No. 4," and duly paid the fee required by law for recording said title, to wit, the sum of fifty cents, to said Librarian of Congress, and that said Librarian of Congress did record the title of such book or other article, to wit, said photograph, in a book kept for that purpose, as required by law and by section 4957 of the Revised Statutes of the United States and the amendments thereof, and the said Librarian of Congress, A. R. Spofford, Esq., did thereupon give a copy of the title or description thereof, under the seal of the said Librarian of Congress, to *to* the said plaintiff, as proprietor thereof, for which the said plaintiff did pay him the fee required by law therefor, to wit, the sum of fifty cents.

Fourthly. The plaintiff further showeth, that on or before the day of publication thereof, to wit, on the ninth day of August, 1893, he did deposit in the mail within the United States, to wit, in the general post-office in the city of Brooklyn, in the State of New York, enclosed in a postpaid wrapper, directed to the Librarian of Congress at Washington, District of Columbia, two copies of such copyrighted book or other article, to wit, two copies of such photograph.

Fifthly. And the plaintiff further showeth, that having in all things complied with the conditions and provisions of the Revised Statutes of the United States in such case made and provided and amendments thereof, as aforesaid, he thereby obtained a copy-
8 right in the United States for said book or other article, to wit, for said photograph, in due form of law, and there was granted and secured to him, said plaintiff, and he had the sole liberty of printing, reprinting, publishing, completing, copying, executing and vending the same, for the term of twenty-eight (28) years from the

said time of recording the title thereof, to wit, from the ninth day of August, 1893.

Sixthly. And the plaintiff further showeth that he did duly give the notice of said copyright, as required in the said Revised Statutes of the United States, and the act amending the same, by inscribing upon some visible portion of the several copies of every edition published of said photograph, upon the face or front thereof, the following words, to wit, "Copyright '93, by Bolles, Brooklyn."

Seventhly. And the plaintiff further showeth, that thereupon and ever since he obtained said copyright, as aforesad, he has been the sole owner thereof, and has expended large sums of money in obtaining, making and publishing the said copyright photograph, and is entitled to all the benefits and advantages of the same; that he has made sufficient numbers of said copyright photograph, and had and has the same for sale to the public at a reasonable price, and is and was able to supply the public therewith, and is entitled to receive the profits to be derived therefrom, the exclusive and sole liberties so to him secured, as aforesaid, and that prior to the unlawful acts of the defendant hereinafter set forth, he made great gains and profits by his said copyright and the publication and vending of said copyright photograph.

Eighthly. And the plaintiff further showeth, upon information and belief, that while he, the said plaintiff, was lawfully in possession of his aforesaid rights and liberties and in the receipt of
9 gains and profits of said photograph, copyrighted as aforesaid, the defendant, The Outing Company, Limited, who are engaged in the business of publishing in the city of New York, as aforesaid, well knowing the premises and the rights so secured to the plaintiff, and without the consent of the plaintiff, the proprietor of the copyright, first obtained in writing, signed in presence of two or more witnesses, and within two years next before the commencement of this action, to wit, since the ninth day of August, 1893, and after the recording of said title as aforesaid, and within the term limited, to wit, within twenty-eight years from recording the title thereof, as aforesaid, at and within the said city of New York, and within the United States, engraved, etched, worked, cut and printed, either in whole or in part, or by varying the main design, with intent to evade the law, great numbers, to wit, forty thousand copies, of said copyright photograph, one of which copies is hereto annexed and marked "Exhibit B," and made a part hereof, and, knowing the same to be so printed, did sell, or did expose to sale, great numbers, to wit, forty thousand copies thereof, at the said city of New York, within the southern district of New York, and within the United States, all contrary to the statute in such case made and provided, and contrary to section 4952 and section 4965 of the Revised Statutes of the United States and amendments thereof, and to the great damage of the plaintiff, whereby by force of the statute, defendant forfeited to plaintiff, the proprietor of said copyright photograph, all the plates on which the same were copied, as aforesaid, and that the value of said plates is and was one hundred dollars, and that by reason of the premises the said defendant also forfeited

to the plaintiff, the proprietor of said copyright photograph, every sheet thereof, to wit, all the aforesaid forty thousand copies, either printed or copied, and that the value of said sheets of forty
10 thousand copies is ten thousand dollars, whereby there accrued to the said plaintiff the aggregate of said several sums, to wit, the sum of ten thousand one hundred dollars, for which said sum of ten thousand one hundred dollars the plaintiff claims judgment against the defendant.

For a second cause of action plaintiff says:

Firstly. That for many years prior to and at and since the times mentioned in this complaint the plaintiff resided in and carried on business in the city of Brooklyn, county of Kings and State of New York, in the United States, said business being that of a photographer, and that he is and was well and favorably known in such business, and that said business was and is carried on and was and is known by the name of "Bolles," which is this plaintiff's business name, it being now and having been for many years a general custom in the photographic business, with persons carrying on the same, to use their surnames alone.

That heretofore and in or about the month of August, 1893, the plaintiff made, invented and designed a certain photograph and the negative thereof from a certain ship or sloop yacht, known by the name of the *Vigilant*, at and within the said southern district of New York and within the eastern district of New York, and that the same is the photograph hereinafter referred to, and that the title of said photograph is "Vigilant No. 4," being the number used to designate this particular photograph, and that a copy of said photograph, marked "Exhibit A, 1894," is hereto annexed and made a part of this complaint.

Secondly. And this plaintiff further says that the said photograph, the title of which is "Vigilant No. 4," and which is
11 the subject of this suit, is a new, useful, harmonious, characteristic and spirited picture, and that the same is the original invention and design of this plaintiff, for the reason that it was made by this plaintiff entirely from his own original selection and conception, to which he gave visible form by selecting the moment when the outline of the said yacht, the light, shade, background and poise of said yacht combined to make a harmonious, characteristic and spirited picture, and selecting and choosing such conjunction of conditions through the means of a tugboat under his, plaintiff's, sole direction and control, and from such selection, choice and arrangement, made entirely by plaintiff, produced the picture which is the subject of this suit, and that the terms "author," "inventor" and "designer," as used in this complaint and in the art of photography, mean the person who so produces the photograph.

Thirdly. The plaintiff further showeth that he is the author, inventor, designer and proprietor of the certain photograph and negative thereof, the title or description of which is "Vigilant No. 4," and, being such author, inventor, designer and proprietor, and being a citizen of the United States, and desiring to obtain the copyright for the same, in conformity with the provision of the Revised Statutes

of the United States, this plaintiff, on the ninth day of August, 1893, and before the publication thereof, did deposit in the mail within the United States, to wit, in the general post-office, in the city of Brooklyn, in the State of New York, enclosed in a postpaid wrapper, directed to the Librarian of Congress, Washington, D. C., a printed copy of the title of said book or other article, to wit, of the said photograph, in the following words, to wit, "Vigilant No. 4," and duly paid the fee required by law for recording said title, to wit,
12 the sum of fifty cents, to said Librarian of Congress, and that said Librarian of Congress did record the title of such book or other article, to wit, said photograph, in a book kept for that purpose, as required by law and by section 4957 of the Revised Statutes of the United States and the amendments thereof, and the said Librarian of Congress, A. R. Spofford, Esq., did thereupon give a copy of the title or description thereof under the seal of the said Librarian of Congress, to the said plaintiff, as proprietor thereof, for which the said plaintiff did pay him the fee required by law therefor, to wit, the sum of fifty cents.

Fourthly. The plaintiff further showeth, that on or before the day of the publication thereof, to wit, on the 9th day of August, 1893, he did deposit in the mail within the United States, to wit, in the general post-office in the city of Brooklyn, in the State of New York, enclosed in a postpaid wrapper, directed to the Librarian of Congress, at Washington, District of Columbia, two copies of such copyrighted book or other article, to wit, two copies of such photograph.

Fifthly. And the plaintiff further showeth, that having in all things complied with the conditions and provisions of the Revised Statutes of the United States in such case made and provided and amendments thereof, as aforesaid, he thereby obtained a copyright in the United States for said book or other article, to wit, for said photograph, in due form of law, and there was granted and secured to him, said plaintiff, and he had the sole liberty of printing, reprinting, publishing, completing, copying, executing and vending the same, for the term of twenty-eight (28) years from the said time of recording the title thereof, to wit, from the ninth day of August, 1893.

Sixthly. And the plaintiff further showeth, that he did duly
13 give the notice of said copyright, as required in the said Revised Statutes of the United States, and the act amending the same, by inscribing upon some visible portion of the several copies of every edition published of said photograph, upon the face or front thereof, the following words, to wit: "Copyright, 1893, by Bolles, Brooklyn."

Seventhly. And the plaintiff further showeth, that thereupon and ever since he obtained said copyright, as aforesaid, he has been the sole owner thereof and has expended large sums of money in obtaining, making and publishing the said copyright photograph, and is entitled to all the benefits and advantages of the same; that he has made sufficient numbers of said copyright photograph, and had and has the same for sale to the public at a reasonable price, and is and was able to supply the public therewith, and is entitled to re-

ceive the profits to be derived therefrom, the exclusive and sole liberties so to him secured, as aforesaid; and that prior to the unlawful acts of the defendant hereinafter set forth, he made great gains and profits by his said copyright and the publication and vending of said copyright photograph.

Eighthly. And the plaintiff further showeth, upon information and belief, *and* while he, the said plaintiff, was lawfully in possession of his aforesaid rights and liberties and in receipt of the gains and profits of said photograph, copyrighted as aforesaid, the defendant, The Outing Company, Limited, who are engaged in the business of publishing in the city of New York, as aforesaid, well knowing the premises and the rights so secured to the plaintiff, and without the consent of the plaintiff, the proprietor of the copyright, first obtained in writing, signed in presence of two or more witnesses, and within two years next before the commencement of this action,
14 to wit, since the ninth day of August, 1893, and after the recording of said title as aforesaid, and within the term limited, to wit, within twenty-eight years from recording the title thereof, as aforesaid, at and within the said city of New York, and within the United States, engraved, etched, worked, cut and printed, either in whole or in part, or by varying the main design, with intent to evade the law, great numbers, to wit, forty thousand copies, of said copyright photograph, one of which copies is hereto annexed and marked "Exhibit B," and made a part hereof, and, knowing the same to be so printed, did sell, or did expose to sale, great numbers, to wit, forty thousand copies thereof, at the said city of New York, within the southern district of New York, and within the United States, all contrary to the statute in such case made and provided, and contrary to section 4952 and section 4965 of the Revised Statutes of the United States and amendments thereof, and to the great damage of the plaintiff, whereby by force of the statute, defendant forfeited to plaintiff, the proprietor of said copyright photograph, all the plates on which the same were copied as aforesaid, and that by reason of the premises the said defendant also forfeited to the plaintiff, the proprietor of said copyright photograph, every sheet thereof, to wit, all the aforesaid forty thousand copies, either printed or copied, and that by reason of the said premises the said defendant also further forfeited one dollar for every sheet of the same found in its possession, either printed, printing, copied or exposed for sale, and the plaintiff avers that there were found in the defendant's possession, and sold and exposed for sale by it, at and before the time of the commencement of this suit, forty thousand of such copies, whereby there accrued to said plaintiff the sum of forty thousand dollars, for which said sum of forty thousand dollars the plaintiff claims judgment against the defendant.

15 Wherefore plaintiff demands judgment against the defendant appropriate to the facts set up in the complaint, and for relief accordingly, with costs.

CHARLES E. BOLLES,
By WELLS, WALDO & SNEDEKER,
His Attorneys.

G. E. WALDO, *Of Counsel.*

NOTE.—The exhibits mentioned may be seen at the office of Wells, Waldo & Snedeker, the attorneys for plaintiff, No. 34 Nassau street, New York city.

(Endorsed:) Circuit court of the U. S., southern district of N. Y. Charles E Bolles *v.* The Outing Company, Limited. Summons & complaint. Wells & Waldo, attorneys for plaintiff, 34 Nassau street, New York. I hereby certify, that on the 20th day of April, 1894, at the city of New York, in my district, I personally served the within summons and complaint upon the within-named The Outing Company, Limited, by exhibiting to James H. Worman, president of said company, the within original, and at the same time leaving with him a copy of each thereof. John W. Jacobs, United States marshal, southern district of New York. Dated May 22, 1894. U. S. circuit court. Filed May 22, 1894. John A. Shields, clerk.

16 Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

CHARLES E. BOLLES, Plaintiff,
against
THE OUTING COMPANY, LIMITED, Defendant.

The Outing Company, Limited, answering the complaint herein, by John R. Abney, its attorney, for answer thereto says:

I.

As to the first alleged cause of action:

1. That it denies any knowledge or information sufficient to form a belief as to each and every allegation contained in the first paragraph, down to the second paragraph, under the first alleged cause of action, in the complaint contained, except the fact that at and since the times mentioned in the complaint the plaintiff resided in and carried on business in the city of Brooklyn, county of Kings and State of New York, in the United States, said business being that of a photographer.

2. That it denies any knowledge or information sufficient to form a belief as to each and every allegation contained in para-
17 graphs second, third, fourth, fifth and seventh of the said first alleged cause of action in the complaint.

3. That it denies any knowledge or information sufficient to form a belief as to each and every allegation contained in the sixth paragraph of the said first alleged cause of action in the complaint; and, upon information and belief, it denies that the plaintiff did duly give the notice of said alleged copyright, as required in the Revised Statutes of the United States and the acts amending the same.

4. And it denies each and every allegation contained in the eighth paragraph of the first alleged cause of action in the complaint.

II.

As to the second alleged cause of action:

1. That it denies any knowledge or information sufficient to form a belief as to each and every allegation contained in the first paragraph, down to the second paragraph, under the second alleged cause of action in the complaint contained, except the fact that at and since the times mentioned in the complaint, the plaintiff resided in and carried on business in the city of Brooklyn, county of Kings and State of New York, in the United States, said business being that of a photographer.

2. That it denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs second, third, fourth, fifth and seventh of the second alleged cause of action in the complaint.

3. That it denies any knowledge or information sufficient
18 to form a belief as to each and every allegation contained in the sixth paragraph of the said second alleged cause of action in the complaint; and upon information and belief, it denies that the plaintiff did duly give the notice of said alleged copyright, as required in the Revised Statutes of the United States and the acts amending the same.

4. And it denies each and every allegation contained in the eighth paragraph of the second alleged cause of action in the complaint.

Wherefore the defendant asks that the complaint be dismissed, with costs and disbursements.

JOHN R. ABNEY,
Attorney for Defendant, 80 Broadway, New York.

CITY AND COUNTY OF NEW YORK, *ss:*

James H. Worman, being duly sworn, deposes and says: That he is the president of The Outing Company, Limited, the defendant in the above-entitled action; that the foregoing answer is true, to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true; that the reason why this verification is made by the defendant is that said defendant is a corporation.

JAMES H. WORMAN.

Sworn to before me this 22d day of June, 1894.

THOS. ELDRIDGE,
Notary Public (No. 35), N. Y. City and County.

19 At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the United States court-rooms in the city of New York, on Monday, the 5th day of April, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable E. Henry Lacombe, circuit judge.

CHARLES E. BOLLES
v.
THE OUTING COMPANY, LIMITED.

Now comes the plaintiff, by George E. Waldo, Esq., his attorney, and moves the trial of this case. Likewise comes the defendant by John R. Abney, Esq., its attorney. Thereupon a jury is impanelled and the cause proceeds to trial.

Under stipulation of counsel for the respective parties, the record of the first trial of this action is considered as read in evidence on this trial, beginning at folio 59 down to and including folio 111, together with exhibits.

Counsel for the defendant thereupon moves for direction of verdict for the defendant, which motion is denied.

The court thereupon directs the jury to find a verdict for the plaintiff in the sum of $1.00. Thereupon the jury says that it finds a verdict for the plaintiff for the sum of $1.00.

20 Thereupon counsel for the plaintiff moves for a new trial, which motion is denied.

(An extract from minutes of trial.)

[SEAL.] JOHN A. SHIELDS, *Clerk.*

United States Circuit Court, Southern District of New York.

CHARLES E. BOLLES, Plaintiff,
against
THE OUTING COMPANY, LIMITED, Defendant.

This cause having been regularly brought on for trial upon the issues formed by plaintiff's complaint and defendant's answer before Hon. E. Henry Lacombe and a jury, all the parties being represented by counsel, and the evidence having been presented and heard, and a verdict having been rendered for one dollar in favor of the plaintiff, by direction of the court, and the plaintiff's costs having been duly adjusted at sixty-three and thirty-five one hundredths dollars:

Now, on motion of Wells, Waldo & Snedeker, attorneys for the plaintiff, it is

21 Adjudged, that the plaintiff, Charles E. Bolles, recover of the defendant, The Outing Company, Limited, the sum of one dollar, and his costs adjusted as aforesaid at sixty-three and thirty-five one hundredths dollars, making in all the sum of sixty-four and thirty-five one hundredths dollars ($64.35), and that the plaintiff have execution against said defendant, The Outing Company, Limited, therefor.

Judgment signed this 17th day of April, 1897.

JOHN A. SHIELDS, *Clerk.*

SIR: Take notice that the within is a copy of a judgment this day duly entered in this action in the office of the clerk of this court.

Dated New York, April 17th, 1897.

Yours, &c.,

WELLS, WALDO & SNEDEKER,
Attorneys for Plaintiff, 34 Nassau Street, New York City.

To John R. Abney, Esq., 2 Wall street, New York city.

(Endorsed:) U. S. circuit court. Charles E. Bolles, pl'ff, against The Outing Company, Limited, def't. Judgment. John R. Abney, attorney for def't., 2 Wall street, New York city. U. S. circuit court. Filed Apr. 17, 1897. John A. Shields, clerk.

22 Circuit Court of the United States for the Southern District of New York.

CHARLES E. BOLLES, Plaintiff,
against
THE OUTING COMPANY, LIMITED, Defendant. } Bill of Exceptions.

Appearances.

For plaintiff, Wells, Waldo & Snedeker; B. Lewinson, of counsel.
For defendant, John R. Abney.

Be it remembered, that on the 5th day of April, 1897, the aforesaid action came on for trial at a trial term of this court, before Honorable E. Henry Lacombe, one of the justices thereof, and a jury, and on the trial of the said issue, the plaintiff, to maintain the same, was sworn and examined as a witness in his own behalf, and testified as follows:

I reside in Brooklyn, State of New York.

My place of business is at the corner of Fulton and Clark streets; otherwise 242–244 Fulton street. My business is photography.

I was born in the city of Providence, State of Rhode Island, and have lived in this country ever since. My father and mother were both citizens of the United States; both born in New England, one in Providence and the other in Connecticut, and lived there all their lives.

I have been a resident of Brooklyn, with the exception of
23 one or two short interims, since January, 1871. I commenced to make photographs in 1867 or 1868, perhaps earlier than that, and have been in that business ever since. I commenced business for myself in Brooklyn in May, 1879. I have made a specialty of photographing yachts in motion; since the very early part of 1892 I have devoted all of my time to that specialty, in the proper season, in securing the photographs and selling them; otherwise whenever I could.

That which you now hand me is a photograph of the yacht *Vigilant* made by me and copyrighted under the title of "Vigilant No. 4." I personally made the negative from which that photograph

was made. The negative was made on the waters of Long Island sound. I secured the image on my negative plate on the sound, on one of the days this boat raced, the 7th of August, 1893. It was taken on Long Island sound, in the vicinity of Glen Cove. It was along the Long Island shore of the sound where the race took place, within two miles from that shore.

Q. What did you do to secure that negative which resulted in that picture?

A. I knew that this yacht *Vigilant* was to sail in the race at Glen Cove for the commodore's cup, at the beginning of the August cruise, and being anxious to secure a photograph of her, I engaged a tugboat, subject to my own control and direction. I proceeded to the point of the races, looked over the course, found where the starting line was, and a few moments before the start of the race, in order that I might, as I thought, have a better position, I proceeded in the direction in which the yachts were to go when they started over the line. Having taken up a position, a general position, some three-quarters of a mile in advance of the starting line, a distance sufficiently far in advance *of* this yacht to be in proper trim,

24 under proper headway and have all her sails in order, and in the most artistic and most beautiful position when she came along, I then watched her advance towards me, directing my captain to proceed slowly in the same general direction, keeping my eye upon the boat as she advanced, watching carefully for all the lines and the shadows, the lights and shades, and I directed my tugboat, by direction to the captain, in such a position as to proceed with the yacht under sail. I had many opportunities to make a photograph of her before I selected this one, but I waited until I saw the light and shade, the poise of the boat, the action of the boat upon the water, the action of the wind upon the sails, the water under her bow, and the sky, composing the most artistic and beautiful combination, waiting also until I proceeded sufficiently far to avoid mixing the boat up with others that were seen upon the sound. I then took my camera, which had been ready all this time, and pointing it at the boat secured my impression. That was my impression as you see it here, but not the picture until developed. Then, at the end of the day's work, having secured my impression upon my negative and returning home to my place of business, I went into my dark room, or chemical-room—perhaps some of you know something of the character of the chemical-room. The image on the plate is latent; nothing whatever is visible to the eye. No means can be found to determine whether there is an image upon the sensitive plate, except through chemical treatment, and this chemical treatment requires judgment, taste, knowledge, experience, otherwise all the effect of light and shade and perspective may be destroyed in the plate which you have secured at so much expense and trouble. I developed my plate under these conditions and secured the negative from which this photograph has been printed. This photograph is one of the copies made from that negative.

25 Q. How is a photograph like that made from a negative?

A. The glass plate, which has a gelatine film containing

the image upon it, is placed in a wooden frame, and upon the gelatine side of the negative is placed a piece of paper sensitized with chloride of silver. Having been placed flatly upon the negative, this piece of paper is backed by a soft piece of cloth or paper to keep it in contact. There is an adjustable back to the frame put upon it and clasped down in position, so as to make absolute contact with the negative plate. This frame containing the negative and sensitized paper is then put out or exposed to daylight, and the frame is so arranged that it can be looked at from time to time, to notice the progress of the impression of the image upon the sensitized paper by the action of the light. When the action has gone sufficiently far, in our experience and practice, we remove that and substitute another. At the end of the day, this photograph, along with the others that we may have obtained, is treated chemically to various solutions, washing, &c., to bring the picture to the condition which you see. It is then washed for several hours in abundance of water, to remove all traces of the chemicals, that would otherwise destroy the picture, and then mounted upon this card-board. That finishes the operation.

Q. What did you do with the copies which you made from that negative, in regard to copyrighting it?

A. In this case, the first two photographs which were made from this negative were stamped with my copyright stamp, were entitled with the title I had selected "Vigilant No. 4;" were enclosed in an envelope addressed to the Librarian of Congress, together with a further copyright title containing the title, "Charles E. Bolles, Brooklyn, N. Y., Vigilant No. 4," also enclosing the fee for registering the copyright, and a note to the librarian.

26 Photograph "Vigilant No. 4," marked Exhibit A for identification.

I mailed those two copies to the Librarian of Congress on the 9th day of August, 1893.

Certificate of the deposit of the title of the photograph "Vigilant No. 4" with the Librarian of Congress on August 10, 1893, offered in evidence, admitted and marked Exhibit B, and a copy thereof annexed to the bill of exceptions.

Certificate of the Librarian of Congress of the deposit of two copies of the photograph "Vigilant No. 4," on August 10, 1893, offered and admitted in evidence and marked Exhibit C, and a copy thereof annexed to this bill of exceptions.

I enclosed with these two copies the fee for copyrighting, and either the postage on the envelope I deposited, or used the copyright frank, the copyright label which the librarian furnishes; either the postage was paid or the frank used, and these were mailed before the publication of this picture or the sale of any number of them. They were the first two copies made from the negative. This photograph marked "Exhibit A for identification" is a copy of the photographs which were deposited, and is a photograph printed

from the same negative. It is the one just marked Exhibit A, and referred to in the complaint.

Exhibit A for identification admitted, marked in evidence, and a copy thereof annexed to this bill of exceptions.

There has never to my knowledge been issued from this negative a photograph which was not stamped with the copyright as
27 shown here. I have had possession of this negative from which the picture, Exhibit A, was taken, ever since it was made. No one else had access — or control of it. The two copies which were filed with the Librarian of Congress, as I have testified, were of this same edition and of the best edition issued by me. Just the same as this.

Q. Look at this copy of the *Outing* magazine, at the front page of the cover and at page 161, and state what that is.

A. That is a reproduction of my copyrighted photograph, "Vigilant No. 4," Exhibit A.

Q. Look also at page 161 and see what that is.

A. That is also a reproduction of my copyrighted photograph, "Vigilant No. 4," Exhibit A.

Q. Why do you say that is a reproduction of your photograph?

A. Because in every line, every detail, every minutiæ, everything composing the picture, it is a reproduction, an accurate reproduction, of my photograph.

Book marked Exhibit D for identification.

I never authorized the publication of this photograph, Exhibit A, without the copyright imprint.

Cross-examination by Mr. ABNEY:

Q. You say you have been in business in Brooklyn, as a photographer, since 1879, on your own account?

A. Yes.

Before that I worked for the photographer in Brooklyn, Frank Pearsall. I began work for him in 1871, when I first came to Brooklyn. My business for two or three years prior to that time was employment in other photographic establishments in Philadelphia and in New York a short time, and one or two places in the West. I began to make pictures of yachts about the middle
28 of May, 1892. The negative of which I have been speaking is in my establishment on the other side of the bridge, in Brooklyn. That negative was taken on the 7th day of August, 1893, on the Long Island side of the sound, off Glen Cove harbor, and I presume nearer Glen Cove than any other town; somewhere between 12 and 2 o'clock; the exact time I cannot determine, because I kept no trace of time in the excitement of the moment.

Q. You were excited, were you?

A. Naturally excited in a thing of that kind. Every man with an artistic temperament, seeing such a thing of that kind, throws aside questions of hours and minutes.

This was a race between Glen Cove, Lloyd's Neck and return. I think I left there between four and five. I do not remember the exact hour, but until the finish of the race.

Q. Do you know what became of the *Vigilant* after the race?

A. I know what became of her five minutes afterwards. She broke down after I made my picture; less than five minutes afterwards she was dismasted; her topmast was gone and her bowsprit broken off.

There were a few other boats observing the race; spectators like myself. There was one other photographer there that I know of. He was on another boat.

Q. How many tugs did you notice about there that day?

A. My recollection does not serve me in regard to that at this distance.

Q. About how many?

A. I know there was this other tug called the *Photographer*. I believe there was another tug for the judges of the race. There always is; that is, for the regatta committee and their guests; and the tug I controlled. There may have been others that I do not recall.

29 The other photographer was Mr. Stebbins, of Boston. He was not near me when I took my photograph. He placed himself at the starting line. There were no other boats near me when I took my photograph, to my recollection; I believe not.

Q. How far were you from the *Vigilant* when you took this photograph?

A. I was not nearer than 300 feet; probably between that and 500 feet.

Q. What other boats were in this race besides *Vigilant?*

A. There was the *Colonia*, her competitor, also a candidate for cup defender; there was the *Queen Mab*, *Hildergarde*, and the sloops, important sloops, *Ailsa*, *Ariel*, *Dauntless*, *Romona*.

The COURT: Is it necessary to have them all?

Mr. ABNEY: No.

Q. Did you take photographs of the other boats?

A. I took a number of photographs that day of other boats besides *Vigilant*.

Q. How many photographs did you take of *Vigilant?*

A. That was all I took that day.

Q. Just one?

A. Just one.

Q. Before that day had you taken pictures?

A. Yes.

Q. Where did you take a former picture?

A. On the day she sailed, at Newport, within an hour of the sailing. That was the 1st of July. I made photographs of that negative. I copyrighted those. They were published in the newspapers. I had them published in *Frank Leslie's Magazine*.

Q. Look at the copy of *Frank Leslie* which I show you, dated July

20, 1893, and state whether the first picture in that paper is your photograph, a reproduction of it.

A. That is a reproduction of my photograph.

30 Paper referred to marked Exhibit 1 for identification.

Mr. ABNEY: Was that published as an advertisement, or did they pay you for it?

A. They paid me.

Q. When did you take another photograph of *Vigilant* after July 1st?

A. On August 3d.

Q. Where was that taken?

A. City Island.

Q. Was that photograph published?

A. Both in *Leslie's* and in *Outing*.

Q. What was the number of that photograph?

A. Vigilant No. 3.

Q. What sort of a camera did you use on August 7th, when you took the negative you have referred to?

A. I used a camera that I have constructed for myself, a hand camera; made after my own design and pattern.

Q. A hand camera?

A. A hand camera; a camera to be held in the hand; more commonly called a detective camera.

Q. Did you patent that camera?

A. No.

Q. Has that camera a snap-shot action?

A. It has a shutter; yes, sir.

By Mr. ABNEY:

Q. Did you take any other shot at this *Vigilant* on the 7th of August, 1893, than the one you have testified to?

A. No.

Q. Did you take any other photographs of the *Vigilant* after that time?

A. Other days?

Q. Yes.

31 A. A number.

Q. How many have you taken?

A. Roughly estimating, probably twenty.

Q. And you copyrighted them all?

A. All but two or three very small ones.

Q. Have you never permitted that photograph to be published by the papers without the notice of copyright being placed upon it?

A. It has never been published with my permission without the copyright notice.

Q. Has it ever been published without pay to you?

A. In two instances.

Q. What two?

A. One to a photographic magazine published by Mr. Loeber on

Seventeenth street, I cannot recollect the name of it just at this moment, and the other to the *American Amateur Photographer*.

Q. How many papers published this particular photograph, or copies of it, "Vigilant No. 4"?

A. I think it was reproduced in four instances, to my knowledge.

By the COURT:

Q. There were two, one by Loeber and the other by the *American Amateur Photographer?*

A. Yes, sir.

By Mr. ABNEY:

Q. And two others?

A. The *Outing* was the third.

Q. And the fourth?

A. A paper called *Once a Week*.

Q. How often have your subsequent pictures of *Vigilant* been published, that is, pictures taken after No. 4?

A. I could not go into that. I know there have been many of them published.

32 Q. There were a great many pictures taken of *Vigilant* about that time by other photographers, were there not?

A. Yes, sir.

Q. There were a great many photographers who took *Vigilant?*

A. Not a great many. There were some.

Mr. ABNEY: I wish a letter written by F. C. Beach to C. E. Bolles, in September or October, 1893, requesting leave to publish photograph of the yacht *Vigilant*.

Mr. LEWINSON: We produce letter of that date from F. C. Beach to Bolles, requesting leave to publish pictures of *Valkyrie*. Mr. Abney says this is not the letter he wants. Then he calls for a letter from Stieglitz to Bolles, asking permission to publish *Vigilant*, and we produce it.

Mr. ABNEY: I did not call for a letter from Stieglitz to Mr. Bolles.

Mr. LEWINSON: No such letter as asked for has been received.

The COURT: Then no such letter has been produced.

Mr. ABNEY: I want, second, the reply of C. E. Bolles to said letter of C. E. Beach.

Mr. LEWINSON: We cannot answer that unless we can ask Mr. Bolles.

Mr. ABNEY: I want them, third, to produce any letter written by C. E. Bolles to the Outing Co., Limited, or J. H. Worman, after the date of said letter of F. C. Beach. That was in September or October, 1893, in regard to *Vigilant*.

Mr. WALDO: There was no such letter. Here is a letter we received from Mr. Beach, but that is the only one we received, dated September 26th.

Mr. ABNEY: After, say that date, the 25th of September; a letter from Mr. Bolles, the plaintiff, to J. H. Worman, or the Outing Co.

33 Mr. LEWINSON: Here is the letter and reply. I produce a further letter dated November 4th. Those are the only copies of letters sent by us to Outing that we have.

Mr. ABNEY: I ask that the letter from Charles E. Bolles, dated November 1, 1893, to Outing Co., Limited, be marked for identification.

Marked Exhibit 2 for identification.

Q. Look at this letter from the Outing Company to you, dated November 3d, and say whether that letter was received by you.

A. It was received by me.

Marked Exhibit 3 for identification.

Q. Look at this copy, dated November 4, 1893, and state whether that is a copy of a letter you wrote to Outing Company.

A. Yes, that is mine.

Marked Exhibit 4 for identification.

Q. Look at the letter I hand you, dated November 7, 1893, and state whether that letter was received by you from Outing Co., Limited.

A. It was.

Marked Exhibit 5 for indentification.

Q. Did you write any letter after that to the Outing Co.?

A. If my memory serves me, the last letter you have there was the final communication to the Outing Co.

Mr. LEWINSON: Now, I offer in evidence these exhibits for identification, Exhibits 2, 3 and 4. They have been called for by the other side, and consequently we are entitled to have them in evidence.

34 Exhibits 2, 3 and 4 for identification are marked in evidence and copies thereof annexed to this bill of exceptions.

Redirect examination by Mr. LEWINSON:

Q. What is the trade name you used in your business?

A. Bolles.

My copyrights are in that name. I have been using that name ever since I have been in business.

RICHARD H. RIDGE, sworn and examined on behalf of plaintiff, by Mr. Lewinson, and testified as follows:

I live in Brooklyn and do business in New York. I am a member of the Fless & Ridge Printing Company. I am an officer of that company. I am president. Their business is printing. They are not publishers; they simply print. They did, in November, 1893, at the request and in the hire of "Outing," print the issue of November, 1893, of that magazine.

Q. Look at Exhibit D for identification, and state whether that

is the magazine, the November issue of 1893, that you printed for and at the request in the hire of *Outing*.

A. Yes.

Q. Were all the copies of that issue alike?

A. They were not.

Q. In what *request* were they not alike?

A. There was a cut changed.

Q. What cut?

A. I cannot tell.

Q. Which cut was changed?

A. I do not know.

Q. How do you know that a cut was changed?

A. Because there was a stoppage of the forms for a change of cut. We have no record of the specific cut.

35 Q. Did all the copies of *Outing* for that issue have this cover?

A. I could not swear to that.

Q. Was the cut a cut on the cover or a cut within?

A. I cannot answer that.

By the COURT:

Q. You mean you do not know?

A. I do not know.

By Mr. LEWINSON:

Q. You do not know whether the forms were stopped for the cover or the inside?

A. I do not know.

Q. The inside is printed on sheets which are subsequently folded?

A. Yes.

Q. And the cover is printed separately.

A. Not separately, but collectively?

Q. I mean to say that the cover is no part of the inside matter that is printed?

A. No, sir.

Q. The cover is printed by itself?

A. Yes, sir.

Q. And the reading matter, with the illustrations, articles are printed by themselves?

A. Yes.

Q. Does it happen very often that you have to stop the forms because a cut is changed after you have gone to press?

A. It does.

Q. Don't you remember whether in this particular issue the printing was stopped because the form was to be changed in the cover or the interior matter?

A. I do not.

Q. But you do know that you stopped printing and that a cut was changed?

36 A. I do know.

Q. You know that?

A. I know it from information from my employees.
Q. But you do not know for which one of the cuts?
A. No, sir. If you will allow me to explain it I will explain it.
Q. No. You say that took place because a cut had to be changed?
A. Yes, sir.
Q. And you do not know which one?
A. No, sir.
Q. But is it only a cut that was changed—or the whole paper?
A. The whole paper? No.
Q. And your information and all you know is that a cut was changed?
A. That a cut was changed, yes.
Q. And you do not know whether it is the cover or the inside?
A. No.
Q. Except for the change of a cut, the magazines were all alike of that issue, so far as you know?
A. No, sir.
Q. What else was there?
A. You will have to let me explain if you want that answer definitely and more correctly.
Q. So far as you know?
A. So far as I know I will give my explanation.
Q. So far as you know, with the exception of this change of a cut for which you stopped the forms, the issues of that paper were alike?

The COURT: What is the question?

Q. Were they or weren't they alike?
A. Read that question, please.
Q. Excepting for this cut you speak of, on account of which——
A. I am not speaking of any specified cut.

37 Q. Well, whatever cut you have in mind; with the exception of a cut you speak of, on account of which the forms were stopped, were or were not the numbers of that issue alike?

A. The order did not come down from the Outing Co.——

The COURT: You must answer the question.
The WITNESS: I cannot answer that.

By the COURT:

Q. You said the numbers were not all alike, because there was a cut changed. Now, taking that out, except for that cut that was changed, were they alike?
A. They were not alike.
Q. In what respect did they differ?
A. That I cannot answer. The Outing Co. gives us the order to go ahead in the store; then they ordered the presses stopped, as they wished to make some changes, and the changes have been made. Those changes may have been of more than one cut, but as I understood it, it was one cut.

By Mr. LEWINSON:

Q. That is the best of your knowledge?
A. Yes, sir.

Q. And excepting for one cut, so far as you know, the issues were all alike?

A. That is right.

Q. The magazine, after it was printed, was disposed of according to the instructions of the defendant, wasn't it?

A. It was.

Q. And you exercised no ownership over it except as the agent of the defendant?

A. As the agent of the defendant.

Q. You did not sell any?

A. I did not.

Q. You did not deal in them at all?

A. No, sir.

38 Q. You handled them as you were told to handle them by "Outing"?

A. Yes, sir.

Q. You were asked to bring such records as your business shows, stating the number of copies of this issue that were printed for and delivered into the possession of the defendant. Have you brought that record?

A. I decline to answer that question on the same grounds.

The COURT: You can answer the question whether you have brought the record or not.

A. I have.

Q. Have you the record with you?

A. I have.

First exception.—That the attorney for the plaintiff then asked the witness, Richard R. Ridge, the following question:

"Q. How many copies of that issue did you print for and deliver to 'Outing'?"

Mr. Abney, defendant's counsel, then objected to said question as follows:

"My objections to it are:

First. That the witness cannot be made to incriminate himself, and he objects to answer the question."

Which first objection the court overruled. Mr. Abney, defendant's counsel, then made the further objection to the question as follows:

"Second. That the question is immaterial, irrelevant and incompetent, inasmuch as the law requires that the copies found in the possession of the defendant shall be the measure of the penalty, and not the copies which they published."

39 The court thereupon sustained said second objection and excluded said question; to which ruling of the court counsel for plaintiff duly excepted.

Second exception.—The counsel for plaintiff then asked the witness, Richard R. Ridge, the following question:

"Q. How many copies of that issue did you deliver into the possession of the defendant?"

Mr. Abney, attorney for defendant, then objected to said question as follows:

"My objections to the question are:

First. That the witness cannot be made to incriminate himself, and he objects to answer the question."

Which first objection the court overruled.

Mr. Abney, defendant's counsel, then made the further objection to the question as follows:

"Second. That the question is immaterial, irrelevant and incompetent, inasmuch as the law requires that the copies found in the possession of the defendant shall be the measure of the penalty, and not the copies which they published."

The court thereupon sustained said second objection and excluded the said question; to which ruling of the court the plaintiff duly excepted.

Exhibit D, for identification, being a copy of the issue of November, 1893, of the magazine known as *Outing*, is offered and marked in evidence. The original exhibit was deposited with the clerk of this court for production on the hearing upon the writ of error and this bill of exceptions herein, the same to be treated as a model exhibit.

40 Third exception.—Henry Dexter, president of the American News Company, called and sworn to testify in behalf of the plaintiff, is asked by plaintiff's counsel:

"Q. How many copies of Exhibit D did you receive from the possession of the defendant for the purpose of sale and distribution on the defendant's behalf?"

The counsel for defendant thereupon objected to said question, and the court sustained said objection and excluded said question; to which ruling of the court the plaintiff duly excepted.

It was then, by stipulation between counsel for plaintiff and counsel for defendant, admitted that an employee of the plaintiff, on November 9, 1893, purchased of the defendant, in exchange for the sum of twenty-five cents, Exhibit D, and also that this action was begun on April 18, 1894, by the issuance of a summons on that date.

The plaintiff then rested.

Mr. ABNEY: "I move that your honor direct a verdict in favor of defendant, first, upon the ground that plaintiff has not shown that he is entitled to a copyright in this case on this photograph."

Which motion the court thereupon overruled.

Fourth exception.—Mr. Abney, counsel for defendant, thereupon moved that a verdict be directed in favor of defendant, as follows:

"I now move to direct a verdict in favor of the defendant, upon the ground that the statutory notice required was not given.

41 First. In that the stamp upon the photograph is not sufficiently plain as to be visible within the meaning of the statute."

Which motion was by the court, upon said first ground, overruled.

Mr. Abney then moved that a verdict be directed in favor of the defendant, as follows:

"Second. Upon the ground that the statutory notice required was not given, in that the statute requires that the stamp or copyright notice upon the photograph should be in the following form, viz., 'Copyright, 18—, by A B,' stating the year in full and the full name of the person who claims the copyright, while the stamp upon the photograph in question is in the following form, 'Copyright '93, by Bolles, Brooklyn,' which is not a sufficient notice under the statute, as the year should be given in full and the full name of the owner of the copyright."

Which motion the court denied, and exception taken to such ruling by the defendant.

The defendant thereupon rested.

Fifth exception.—The court thereupon directed a verdict in favor of the plaintiff as follows, to wit:

"The COURT: The testimony being now closed, in view of the recent decision of the circuit court of appeals in this case, there seems to be nothing to do except to direct a verdict in favor of the plaintiff for the single copy which is proved to have been found in possession of the defendant.

A verdict is thereupon directed in favor of the plaintiff for the sum of one dollar."

To which direction the defendant excepted.

42 Sixth exception.—The jury thereupon rendered a verdict in favor of the plaintiff, as directed by the court.

The plaintiff thereupon moved for a new trial on the ground that the court's refusal to permit the plaintiff to prove the number of copies which had been in the defendant's actual physical possession at any time within two years previous to the commencement of this action is a prejudicial error.

The court thereupon denied said motion for a new trial; to which denial and ruling of the court the plaintiff duly excepted.

The foregoing bill of exceptions contains all the evidence produced and given upon the trial, together with the rulings of the court and the exceptions thereto.

And forasmuch as the facts aforesaid and the decisions of the court thereon, and the exceptions to such decisions, do not appear of record, the plaintiff prays that this, his bill of exceptions, may be allowed.

WELLS, WALDO & SNEDECKER,
Attorneys for the Plaintiff.

43 It is hereby stipulated and agreed that the foregoing bill of exceptions contains all the evidence and proofs produced and given upon the trial of this action, and that the same be settled and allowed as the bill of exceptions of the plaintiff herein.

JOHN R. ABNEY,
Attorney for Defendant.

The aforesaid bill of exceptions contains all of the evidence and proofs given and produced upon the trial of this action, and is by me allowed and settled as above.

E. H. LACOMBE,
Justice of the U. S. Circuit Court, Southern District of N. Y.

44 EXHIBIT B.

Librarian of Congress, Copyright Office, United States of America.

No. 37143, Y.

LIBRARY OF CONGRESS,
COPYRIGHT OFFICE, WASHINGTON.

To wit: Be it remembered, that on the 10th day of August, anno Domini 1893, Charles E. Bolles, of Brooklyn, N. Y., has deposited in this office the title of a photograph, the title or description of which is in the following words, to wit:

Vigilant No. 4.

The right whereof he claims as proprietor, in conformity with the laws of the United States respecting copyrights.

A. R. SPOFFORD,
Librarian of Congress.

EXHIBIT C.

Librarian of Congress, Copyright Office, United States of America.

LIBRARY OF CONGRESS, WASHINGTON, D. C.

I certify that two copies of a photograph, Vigilant No. 4, were deposited in this office by Charles E. Bolles on the 10th day of August, 1893.

Witness my hand and the seal of my office this 1st day of March, 1895.

A. R. SPOFFORD,
Librarian of Congress.

45 EXHIBIT No. 2 FOR IDENTIFICATION.

Chas. E. Bolles, 244 Fulton St., cor. Clark St., Brooklyn; makes a specialty of photographing yachts, under sail or steam, yacht interiors and groups.

(Cut.)

Nov. 1ST, 1893.

The Outing Co.

DEAR SIRS: In issuing your forthcoming book on the International yacht race, I have to request that you will not use for illustration in it any of my copyrighted photographs, without first obtaining my consent to such use; otherwise I shall have to hold you responsible under the copyright law.

Respectfully yours, CHAS. E. BOLLES.

Sent by registered mail Nov. 2nd.

46 EXHIBIT 3 FOR IDENTIFICATION.

(Cut.)

J. H. Worman, president; B. J. Worman, secretary.

According to our books, the average monthly sale of Outing at the present time is more than double that of the sale during the corresponding period last year.—PATRICK FARRELLY, *Manager American News Co.*

The Outing Company, Limited, New York and London.

Replying to yours of the ——.

239 FIFTH AVENUE, NEW YORK,
NEW YORK, *Nov. 3rd*, '93.

Mr. Chas. E. Bolles, 244 Fulton St., Brooklyn, N. Y.

DEAR SIR: We have your esteemed favor of the 1st of Nov. Mr. Steiglitz made a full-page illustration of *Vigilant* for the *Amateur Photographer*, and we supposed informed you this cut would be used in the *Amateur Photographer* and in *Outing*. If this is not agreeable to you, giving you due credit as a photographer in the forthcoming book, we shall be obliged to have Cozzens paint us a picture of *Vigilant* at once. We know of no other cuts of yours that we are likely to use. If, however, any of the cuts should be credited to you, we shall be very glad to see that such credit is given. To this end we shall take pleasure in sending you, if you so desire, a compiete set of our final page proofs, in order that this correction may be properly made.

Yours very truly, THE OUTING CO., LTD.
J. H. WORMAN.

47 EXHIBIT 4 FOR IDENTIFICATION.

Chas. E. Bolles, 244 Fulton St., cor. Clark St., Brooklyn; makes a specialty of photographing yachts, under sail or steam, yacht interiors and groups.

(Cut.)

Nov. 4, 1893.

Outing Co., J. H. Worman.

DEAR SIRS: Your publication of my copyrighted photograph of "Vigilant No. 4" in the current number of *Outing*, in the face of my instructions mailed you, that the photograph was to be used in the *Amateur Photographer* only, is a violation of the copyright law. I shall take immediate steps against you under that law unless you make satisfactory settlement with me at once.

Respectfully yours, CHAS. E. BOLLES.

Registered mail, Nov. 5, '93.

(Endorsed:) United States circuit court, southern dist. of N. Y. Charles E. Bolles *vs.* The Outing Company, Limited. Bill of exceptions. Wells, Waldo & Snedeker, attorneys for plaintiff, 34 Nassau street, Mutual Life building. Due and timely service of a copy of the within bill of exceptions and of the following notice is admitted. Dated New York, Apr. 21, 1897. Service ——. John R. Abney, att'y for Outing Co., Ltd. Please take notice that the within is a copy of the plaintiff's bill of exceptions in the within-entitled action. Dated New York city, Apr. 21, 1897. Yours, &c., Wells, Waldo & Snedeker, attorneys for pl'ff, 34 Nassau street, New York. To John R. Abney, Esq., attorney for def't. U. S. circuit court. Filed Apr. 21, 1897. John A. Shields, clerk.

48 Circuit Court of the United States for the Southern District of New York.

CHARLES E. BOLLES, Plaintiff, *against* THE OUTING COMPANY, LIMITED, Defendant. } At Law. Assignment of Errors.

The plaintiff in this action, in connection with his petition for a writ of error, makes the following assignment of errors, which he avers occurred upon the trial of the cause, to wit:

I. The court erred in the rejection of evidence offered by the plaintiff upon said trial, in the following instances, to wit:

(1.) In that the attorney for the plaintiff asked the witness Richard R. Ridge the following question:

"Q. How many copies of that issue did you print for and deliver to 'Outing'?"

The defendant's counsel then objected to said question as follows:

"My objection to it is, that it is immaterial, irrelevant and incompetent, inasmuch as the law requires that the copies found in the possession of the defendant shall be the measure of the penalty and not the copies which they published."

The court thereupon sustained said objection and excluded said question; to which ruling of the court the plaintiff duly excepted.

49 (2.) In that the counsel for plaintiff asked the witness Richard R. Ridge the following question:

"Q. How many copies of that issue did you deliver into the possession of the defendant?"

The defendant's counsel then objected to said question as follows:

"My objection to the question is that it is immaterial, irrelevant and incompetent, inasmuch as the law requires that the copies found in possession of the defendant shall be the measure of the penalty, and not the copies which they published."

The court thereupon sustained said objection and excluded said question; to which ruling of the court the plaintiff duly excepted.

(3.) In that the witness Henry Dexter, president of the American News Company, being called and sworn to testify in behalf of the plaintiff, was asked by plaintiff's counsel the following question:

"Q. How many copies of Exhibit D did you receive from the possession of the defendant, for the purpose of sale and distribution, on the defendant's behalf?"

The defendant's counsel thereupon objected to said question, and the court sustained said objection and excluded said question.

II. That the court erred in overruling the motion of the plaintiff for a new trial.

WELLS, WALDO & SNEDEKER,
Attorneys for Plaintiff.

G. E. WALDO, *Of Counsel.*

50 (Endorsed:) Circuit court of the U. S., southern dist. of N. Y. Charles E. Bolles *vs.* The Outing Company, Limited. Assignment of errors. Wells, Waldo & Snedeker, attorneys for plaintiff, 34 Nassau street, New York, Mutual Life building. U. S. circuit court. Filed Ap. 21, 1897. John A. Shields, clerk.

Circuit Court of the United States for the Southern District of New York.

CHARLES E. BOLLES, Plaintiff, *against* THE OUTING COMPANY, LIMITED, Defendant.	At Law. Petition for Writ of Error.

Now comes Charles E. Bolles, plaintiff herein, and says:

That on or about the 17th day of April, 189–, this court entered a judgment herein in favor of the defendant and against this plaintiff, in which judgment and the proceedings had prior thereunto in this case certain errors were committed, to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf to the United States circuit court of appeals for the second circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause,
51 duly authenticated, may be sent to the said circuit court of appeals.

WELLS, WALDO & SNEDEKER,
Attorneys for Plaintiff.

G. E. WALDO, *Of Counsel.*

(Endorsed:) Circuit court of the U. S., southern dist. of N. Y. Charles E. Bolles *vs.* The Outing Company, Limited. Petition for writ of error. Wells, Waldo & Snedeker, attorneys for plaintiff, 34 Nassau street, New York, Mutual Life building. U. S. circuit court, Filed Apr. 21, 1897. John A. Shields, clerk.

52 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

CHARLES E. BOLLES, Plaintiff,
vs.
THE OUTING COMPANY, LIMITED, Defendant.
} Bond for Damages and Costs.

Know all men by these presents, that we, Edmond C. Browne, James Constable, of 194 Fulton street, Brooklyn, of 246 Fulton street, Brooklyn, are held and firmly bound unto the above-named defendant in the sum of two hundred and fifty ($250) dollars, to be paid to the said The Outing Company, Limited; for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the sixteenth day of April, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas the above-named plaintiff, Charles E. Bolles, has prosecuted a writ of error to the United States circuit court of appeals for the second circuit, for the correction of errors in the judgment entered herein and the proceedings had prior thereunto, and to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

53 *Now, therefore*, the condition of this obligation is such, that if the above-named Charles E. Bolles shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

EDMOND C. BROWNE. [L. S.]
JAMES CONSTABLE. [L. S.]

Sealed and delivered and taken and acknowledged, this 16th day — April, 1897, before me—

C. B. GRAHAM,
Notary Public, Kings Co.

Certificate filed in New York Co.

STATE OF NEW YORK, } *ss:*
County of Kings, }

James Constable, being duly sworn, doth depose and say, that he is a resident and a householder within the State of New York, and that he is worth the sum of five hundred ($500) dollars, over and above all his just debts and liabilities, which he owes or has incurred, and exclusive of property exempt by law from levy and sale under execution.

JAMES CONSTABLE.

Sworn to this 16th day of April, A. D. 1897, before me—

C. B. GRAHAM,
Notary Public, Kings Co.

54 STATE OF NEW YORK, } ss:
County of Kings, }

Edmond C. Browne, being duly sworn, doth depose and say, that he is a resident and a householder within the State of New York, and that he is worth the sum of five hundred ($500) dollars, over and above all his just debts and liabilities, which he owes or has incurred, and exclusive of property exempt by law from levy and sale under execution.

EDMOND C. BROWNE.

Sworn to this 16th day of April, 1897, before me—
C. B. GRAHAM,
Notary Public, Kings Co.

(Endorsed:) U. S. circuit court, southern dist. of N. Y. Charles E. Bolles *vs.* The Outing Company, Limited. Bond for damages and costs. Wells, Waldo and Snedeker, attorneys for plaintiff, 34 Nassau street, New York, Mutual Life building. Approved as to form and sufficiency of sureties April —, 1897. U. S. circuit court. Filed April 21, 1897. John A. Shields, clerk.

55 UNITED STATES OF AMERICA, *ss:*

To the Outing Company, Limited, Greeting:

You are hereby cited and admonished to be and appear at the United States circuit court of appeals, to be holden at New York, on the 26 day of April, eighteen hundred and ninety-seven, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Charles E. Bolles is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated Apr. 21, 1897.

E. H. LACOMBE,
U. S. Circuit Court Judge.

(Endorsed:) U. S. circuit court. Charles E. Bolles, pl'ff in error, *vs.* The Outing Company, Limited, def't in error. Citation. Wells, Waldo & Snedeker, attorneys for plaintiff, 34 Nassau street, New York, Mutual Life building. Due and timely service of the within citation in error is admitted. Dated New York, December 26th, 1895. John R. Abney, att'y for The Outing Co., Limited, defendant in error. U. S. circuit court. Filed Apr. 21, 1897. John A. Shields, clerk.

MEMORANDUM DECISION, APRIL 28, 1898.—"Judgment affirmed on opinion filed on former decision."

56 At a stated term of the U. S. circuit court of appeals for the second circuit, held at the court-room thereof, at the post-office, in the city of New York, on the 3rd day of May, 1897.

Present: Hon. William J. Wallace, Hon. Nathaniel Shipman, Hon. E. H. Lacombe, JJ.

CHARLES E. BOLLES, Plaintiff in Error,
against
THE OUTING COMPANY, LIMITED, Defendant in Error.

The above-entitled action having been duly brought on for argument upon the writ of error sued out of this court on the twenty-first day of April, 1897, by the plaintiff herein to review the judgment entered in the office of the clerk of the United States circuit court for the southern district of New York on the 17th day of April, 1897, in favor of the plaintiff, Charles E. Bolles, and against the defendant, The Outing Company, Limited, for the sum of one dollar and costs, amounting in all to the sum of sixty-four and thirty-five one-hundredths dollars ($64.35), and after hearing B. Lewinson, Esq., of counsel for the plaintiff in error, and John R. Abney, Esq., attorney and counsel for the defendant in error, and due deliberation having been had:

57 Now, on motion of John R. Abney, Esq., attorney and counsel for the defendant in error, it is—

Ordered, adjudged, and decreed that the said judgment be, and the same hereby is, in all things affirmed, with costs to the defendant in error, and that a mandate issue to the court below.

(Endorsed:) U. S. circuit court of appeals, second circuit. Charles E. Bolles, pl'ff, against The Outing Company, Limited, def't. Original order and notice of settlement. John R. Abney, attorney for def't, 2 Wall street, New York city. U. S. circuit court of appeals, second circuit. Filed May 4, 1897. James C. Reed, clerk. To Wells, Waldo & Snedeker, att'ys for plaintiff in error. Due and timely service of a copy of the within order and notice is hereby admitted. Dated New York, April 28, 1897.

58 Supreme Court of the United States.

CHARLES E. BOLLES, Plaintiff in Error,
against
THE OUTING COMPANY, LIMITED, Defendant in Error. } At Law. Assignment of Errors.

And now comes the said Charles E. Bolles, the plaintiff in error, by Wells, Waldo & Snedeker, his attorneys, and in connection with his petition for a writ of error makes the following assignment of errors, and says that in the record and proceedings in the above-entitled action there is manifest error, in this, to wit:

I. The court erred in the rejection of evidence offered by the plaintiff upon the trial in the following instances, to wit:

(1.) In that the counsel for the plaintiff asked the witness Richard R. Ridge the following question:

"Q. How many copies of that issue did you print for and deliver to 'Outing'?"

The defendant's counsel then objected to said question as follows:

"My objection to it is that it is immaterial, irrelevant, and incompetent, inasmuch as the law requires that the copies found in the possession of the defendant shall be the measure of the penalty, and not the copies which they published."

The court thereupon sustained said objection and excluded
59 said question; to which ruling of the court the plaintiff duly excepted.

(2.) In that the counsel for plaintiff asked the witness Richard R. Ridge the following question:

"Q. How many copies of that issue did you deliver into the possession of the defendant?"

The defendant's counsel then objected to said question as follows:

"My objection to the question is that it is immaterial, irrelevant, and incompetent, inasmuch as the law requires that the copies found in possession of the defendant shall be the measure of the penalty, and not the copies which they published."

The court thereupon sustained said objection and excluded said question; to which ruling of the court the plaintiff duly excepted.

(3.) In that the witness Henry Dexter, president of the American News Company, being called and sworn to testify in behalf of the plaintiff, was asked by plaintiff's counsel the following question:

"Q. How many copies of Exhibit D did you receive from the possession of the defendant for the purpose of sale and distribution on the defendant's behalf?"

The defendant's counsel thereupon objected to said question, and the court sustained said objection and excluded said question.

II. That the court erred:

(4.) In overruling the motion of the plaintiff for a new trial.

III. The plaintiff in error assigns the following errors committed by the circuit court of appeals for the second circuit in render-
60 ing its judgment of affirmance, to wit:

(5.) The said circuit court of appeals erred in affirming the said judgment of the circuit court for the southern district of New York.

(6.) The said circuit court of appeals erred in ruling that the circuit court did not err in the rejection of evidence offered by the plaintiff upon said trial, as stated in the first assignment of error hereinbefore set forth.

(7.) That the said circuit court of appeals erred in ruling that the said circuit court did not err in the rejection of evidence offered by the plaintiff upon said trial, as stated in the second assignment of error hereinbefore set forth.

(8.) That the said circuit court of appeals erred in ruling that the said circuit court did not err in the rejection of evidence offered by the plaintiff upon said trial, as stated in the third assignment of error hereinabove set forth.

(9.) That the said circuit court of appeals erred in ruling that the said circuit court did not err in refusing to permit the plaintiff to prove the number of copies of Exhibit D which had been in the defendant's actual physical possession at any time within two years previous to the commencement of this action.

(10.) That the said circuit court of appeals erred in ruling that the said circuit court did not err in overruling the motion of the plaintiff for a new trial.

WELLS, WALDO & SNEDEKER,
Attorneys for Plaintiff in Error.

G. E. WALDO, *Of Counsel.*

Endorsed: Supreme Court of the United States. Charles E. Bolles, plaintiff, against The Outing Co., Ltd., defendant. Original assignment of errors. Wells, Waldo & Snedeker, attorneys for plaintiff, 34 Nassau St., New York. United States circuit court of appeals, second circuit. Filed Mar. 7, 1898. William Parkin, clerk.

61 Supreme Court of the United States.

CHARLES E. BOLLES, Plaintiff,
against
THE OUTING COMPANY, LIMITED, Defendant. } Petition for Writ of Error.

The petitioner, Charles E. Bolles, states that there is pending in the United States circuit court for the southern district of New York as action at law for penalties, under sections 4952 and 4965 of the Revised Statutes of the United States and amendments thereof, for violation of defendant's copyright of a certain photograph of a certain ship or sloop yacht, known by the name of "Vigilant," wherein the petitioner herein is plaintiff and the said "The Outing Company, Limited," is defendant.

I. That the said plaintiff, in his complaint filed in said action May 22nd, 1894, demanded judgment against said defendant appropriate to the facts set up in the complaint and for relief accordingly, with costs.

II. That said action was tried in the said circuit court for the southern district of New York on the 5th day of April, 1897, and by direction of the court the verdict rendered in favor of the plaintiff and against the defendant for the sum of $1.00, and on the 17th day of April, 1897, judgment was entered for said sum and for costs, amounting to $64.35.

III. That thereafter and on the 21st day of April, 1897, the
62 said plaintiff, petitioner and plaintiff in error herein, obtained from the United States circuit court of appeals for the second circuit a writ of error for the review of said judgment and proceedings by the said circuit court of appeals.

IV. That thereafter and to wit, on the 21st day of April, 1897, the said plaintiff in error gave, in said action, a supersedeas bond; which bond was duly proved and filed in said action.

V. That the transcript of the record in the said action was duly made up by the clerk of the circuit court for the southern district of New York, and was filed in the clerk's office of said circuit court of appeals on April 21st, 1897.

VI. That said cause was heard by the said circuit court of appeals, and on the 3rd day of May, 1897, judgment was rendered therein by said circuit court of appeals affirming said judgment of said circuit court for the southern district of New York and directing its mandate to issue in said case.

VII. That the petitioner, the plaintiff in error herein, is aggrieved by the judgment of the said circuit court for the southern district of New York and by the judgment of affirmance and for mandate by said United States court of appeals for the second circuit.

Wherefore your petitioner, the plaintiff in error, prays that a writ of error may issue in his behalf to the United States circuit court of appeals for the second circuit for the review by the United States Supreme Court of said judgment of the circuit court of
63 appeals and of the judgment of the circuit court for the southern district of New York, and for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said circuit court of appeals.

WELLS, WALDO & SNEDEKER,
Attorneys for Plaintiff.

G. E. WALDO, *Of Counsel.*

Endorsed: Supreme Court of the United States. Charles E. Bolles, against The Outing Company, Ltd. Original petition for writ of error. Wells, Waldo & Snedeker, attorneys for plaintiff, 34 Nassau street, New York. United States circuit court of appeals, second circuit. Filed Mar. 7, 1898. Wm. Parkin, clerk.

64 Supreme Court of the United States.

CHARLES E. BOLLES, Plaintiff in Error, *against* THE OUTING COMPANY, LIMITED, Defendant in Error. } Order for Writ of Error.

On reading and filing petition of said plaintiff in error—

It is ordered that the said plaintiff in error execute to said defendant in error a bond, with two sureties, in the sum of five hundred dollars, conditioned that said plaintiff in error shall prosecute his writ of error to effect and if he fail to make his plea good shall answer all damages and costs, and upon the approval of said bond by a justice of this court within the time required by law and the service of said writ within the time required by law all process upon the judgment of said circuit court of appeals and upon the judgment of the United States circuit court for the southern district of New York be stayed during the pendency of said writ.

Dated Feb. 28, 1898.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

Endorsed: Supreme Court of the United States. Charles E. Bolles, plaintiff, *vs.* The Outing Co., defendant. Original order granting writ of error and fixing the amount of bond. Wells, Waldo & Snedeker, attorneys for plaintiff, 34 Nassau St., city. United States circuit court of appeals, second circuit. Filed Mar. 7, 1897. William Parkin, clerk.

65 Know all men by these presents that we, Charles E. Bolles, of No. 244 Fulton street, Brooklyn, N. Y., as principal, and George F. Van Doorn, of No. 346 Macon street, Brooklyn, N. Y., and —— ——, as sureties, are held and firmly bound unto The Outing Company, Limited, in the full and just sum of five hundred ($500.00) dollars, to be paid to the said The Outing Company, Limited, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of ——, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas lately, at a stated term of the United States circuit court of appeals for the second circuit, in a suit depending in said court between said Charles E. Bolles, plaintiff in error, and the said The Outing Company, Limited, defendant in error, a decree was rendered against the said Charles E. Bolles, plaintiff in error, on the third day of May, 1897, affirming the judgment of the circuit court for the southern district of New York, rendered April 17, 1897, and the said Charles E. Bolles, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said decree in the aforesaid suit, and a citation directed to the said The Outing Company, Limited, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within — days from the date thereof:

Now, the condition of the above obligation is such that if the said Charles E. Bolles shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

CHAS. E. BOLLES. [SEAL.]
GEO. F. VAN DOORN. [SEAL.]
F. H. CHANDLER. [SEAL.]

Sealed and delivered in presence of—
C. B. GRAHAM.
C. B. GRAHAM.
C. B. GRAHAM.

Approved by—
R. W. PECKHAM,
Asso. Justice of the Supreme Court of the United States.

February 28, 1898.

Copy.

66 UNITED STATES OF AMERICA, *ss:*

To the Outing Company, Limited, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of appeals for the second circuit, wherein Charles E. Bolles is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this 28th day of Feb'y, in the year of our Lord one thousand eight hundred and ninety-eight.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

67 Due and timely service of a copy of the within citation is hereby admitted this 7th day of March, 1898.

JOHN. R. ABNEY,
Att'y for the Outing Co. (Ltd.).

[Endorsed:] United States circuit court of appeals, second circuit. Filed Mar. 7, 1898. William Parkin, clerk.

68 UNITED STATES OF AMERICA, } *ss:*
Southern District of New York, }

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 66, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Charles E. Bolles, plaintiff in error, against The Outing Company, Limited, defendant in error, as the same remain of record and on file in my office.

Seal United States Circuit Court of Appeals, Second Circuit.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 8th day of March, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the said United States the one hundred and twenty-second.

WM. PARKIN, *Clerk.*

69 United States Circuit Court of Appeals for the Second Circuit, October Term, 1896.

Submitted December 7, 1896; decided January 13, 1897.

CHARLES E. BOLLES, Plaintiff in Error,
vs.
THE OUTING COMPANY (LIMITED), Defendant in Error. } No. 16.

In error to the circuit court of the United States for the southern district of New York.

Before Judges Wallace and Shipman.

WALLACE, *Circuit Judge:*

Upon this writ of error brought by the plaintiff in the court below to review a judgment for the defendant, error is assigned of the rulings of the trial judge in excluding evidence offered by the plaintiff, and in instructing the jury to find a verdict for the defendant. The action was brought under section 4965 of the U. S. Revised Statutes to recover penalties for the violation of a copyrighted photograph. The defendant was the proprietor of "The Outing," a monthly magazine published at the city of New York. The complaint alleges that the defendant printed in said magazine and sold without the plaintiff's consent forty thousand copies of the photograph, whereby there accrued to the plaintiff pursuant to the statute penalties in the sum of $40,000. Upon the trial it was shown that the defendant's magazine was printed by the Fless & Ridge Printing Company, a concern employed by the defendant to do its printing. The plaintiff offered to prove by a witness the number

70 of copies of the issue containing the photograph which were printed by the Fless & Ridge Company and delivered into the possession of the defendant. The evidence was objected to upon the ground of its incompetency, the statute making the copies found in the possession of the defendant the measure of the penalty, and not the copies published by it. The objection was sustained and the plaintiff duly excepted.

The statute declares that if "any person, after the recording of the title of any * * * photograph, * * * as provided in this chapter, shall, within the term limited, and without the consent of the proprietor of the copyright, first obtained in writing, * * * copy, print, publish or import, * * * with intent to evade the law, or knowing the same to be so printed, published or imported shall sell or expose to sale any copy * * * he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit $1 for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale."

The statute has frequently been considered in the Federal courts. In *Dwight vs. Appleton* (1 *N. Y. Leg. Obs.* 195) it was decided that the jury were authorized to give the statutory penalty "for every sheet contained in the volume *found at any time*, within the period stated in the declaration, to have been in the possession of the de-

fendant." In *Millett vs. Snowden* (1 *West L. J.* 240) the court ruled that if the jury found that the defendant had republished the copyrighted matter without leave obtained in writing of the plaintiff, they must then "proceed to ascertain the number of sheets proved to have *been sold or offered for sale*, and return a verdict of one dollar for each sheet so sold or offered to be sold." In *Reed vs. Carusi* (*Campbell's Rep.* 72) the jury were charged by Chief Justice Taney that if they found the defendant liable, they should "find the number of copies caused to be printed for sale by him, within two years before the suit was brought." Apparently in the two cases last mentioned no point was made that the copies printed had
71 not actually been in the defendant's possession. In *Backus vs. Gould* (7 *How.* 708) the question was before the Supreme Court. In that case, although there was evidence that the defendant had published certain sheets of copyrighted matter, there was no evidence whether or not they had ever been found in his possession, and the court below instructed the jury that the plaintiffs were entitled to recover for every sheet of such matter which he had published, or procured to be published, whether the same were proved to have been found in his possession or not. It was argued that the court below totally disregarded the effect of the words, "found in his possession," and the Supreme Court sustained that contention, stating that "the penalty on each sheet, whether printed or being printed, or published, or exposed to sale, is limited to the sheets in the possession of the defendant," and reversed the judgment.

Since the adjudication in *Backus vs. Gould* it has always been held by the trial courts that the penalty only attaches upon the number of sheets found in the possession of the defendant; but there has been some diversity of opinion whether it was necessary to prove that the sheets had been actually discovered in the possession of the defendant previously to the commencement of the action, or whether it was enough if the evidence authorized a finding that they had been in his possession prior to the bringing of the action.

In *Thornton vs. Schreiber* (124 *U. S.* 612) the statute was before the Supreme Court in a case where the evidence was that a large number of sheets of the copyrighted photograph, published without the consent of the plaintiff, had been found in the store of Sharpless & Sons, in which the defendant was employed in the character of a business manager. Evidence was given showing that Thornton conceived the idea of using the photographs in the business of Sharpless & Sons, and ordered the copies to be made. The court held that upon those facts the court below erred in instructing the jury that the photographs were to be regarded
72 as in the possession of Thornton, saying, "We do not see how Mr. Thornton, merely as an employé, although he may have had a principal place in that establishment, could be said to have had the possession of these prints when they were found by the plaintiff in the store of Sharpless & Sons." It was contended in the case that the words "found in his possession" should be construed as "referring to the finding of the jury," and that the ex-

pression merely meant that where the sheets are ascertained by the finding of the jury to have been at any time in the possession of the person who committed the wrongful act such person is liable to the penalty. Referring to this contention the court said: "We however think that the word 'found' means that there must be a time before the cause of action accrues at which they are found in the possession of the defendant." The observation can only be read as intended to reject the construction contended for, and as expressing the view of the court that it is not enough to show that the sheets have been in the possession of the defendant, but it must be shown that they were actually found there. As the point was not necessary to the decision of the case the observation, strictly speaking, was obiter; but the precise point was presented for consideration, and was considered, and the observation must be accepted as the deliberate opinion of the court.

We are of the opinion that the section means to affix the penalty only when the sheets are shown to have been discovered or detected in the possession of the defendant prior to the bringing of the suit. The statute is apparently framed to give the party whose copyright has been invaded complete relief by an action in which he can procure a condemnation of the infringing sheets, and at the same time recover by way of compensation a penalty for every sheet which he is entitled to condemn. The words, "found in his possession," aptly refer to a finding for the purposes of forfeiture and condemnation. The remedy by condemnation and forfeiture is only appropriate in a case where the property can be seized upon process, and where as here the forfeiture declared is against property of the "offender" is only appropriate when it can be seized in his
73 hands. The section contemplates two remedies enforcible in a single suit each of which depends upon the same state of facts. The aggrieved party may at his election pursue either one or both remedies. But it does not contemplate a recovery of penalties except in respect to the sheets which can be condemned. We regret to feel constrained to place such a narrow interpretation upon the statute, but it cannot be given a more liberal one consistently with the language used. We conclude that the evidence was correctly excluded.

The trial judge directed a verdict for the defendant upon the ground that the plaintiff had not complied with the requirements of section 4962 of the United States Revised Statutes. That section provides that no person shall maintain an action for the infringement of his copyright in a photograph unless he shall have given notice of his copyright by inscribing upon the face or front of the copies of every edition published the words "Entered according to act of Congress in the year —— by A B in the office of the Librarian of Congress, at Washington." The notice upon the plaintiff's copies was as follows: "Copyright 93, by Bolles, Brooklyn." The trial judge ruled this notice to be defective because it omitted to give the first name or initials of the plaintiff, or to state the year the copyright was entered.

The first objection to the sufficiency of the notice is met by the

case of *Lithographic Co. vs. Sarony* (111 *U. S.* 53). In that case, the court after observing in its opinion that "the object of the statute is to give notice of the copyright to the public by placing upon each copy, in some visible shape, the name of the author, the existence of the claim of an exclusive right, and the date at which this right was obtained," held that a notice as follows, "Copyright, 1882, by N. Sarony" was a sufficient compliance. The court said: "It clearly shows that a copyright is asserted, the date of which is 1882, and if the name Sarony alone was used it would be a sufficient designation of the author until it is shown that there is some other Sarony. When, in addition to this, the initial letter of
74 the Christian name, Napoleon, is also given, the notice is complete." The general rule is that in legal proceedings, and in notices prescribed by law, the full name of a party must be given for the purposes of identification, and a designation by the initial letter or letters of the Christian name will not suffice. In the *Sarony* case the court regarded the use of the initial as superfluous, and the use of the surname as sufficient, when it did not appear that the public were likely to be misled by the omission of the full name. In the present case the notice not only gave the author's surname but also his residence; and it appeared by the evidence that the city of his residence was also his place of business, and it did not appear that there was any photographer there or elsewhere of the name of Bolles.

The second objection to the notice seems to be less substantial than the first. Concededly if it had read 1893 instead of 93 the notice would have been sufficient. Could any person possibly be misled by the omission of the figures denoting the century? Photographs are a production of the present century, and no one would imagine that the figures 93 meant 1793 or any earlier time. Manifestly they could not denote 1993 or a future time because they are the statement of an antecedent date, the time when the copyright was recorded in the office of the Librarian of Congress.

We conclude therefore that the trial judge erred in ruling that the notice was invalid and in directing a verdict for the defendant upon that ground.

It has been urged in behalf of the defendant in error that if the ruling of the court below proceeded upon erroneous reasons nevertheless the judgment should be affirmed because no original intellectual conception was involved in the production of the original photograph, and also because the notice inscribed upon the copies was so carelessly and inadequately printed as not to be visible to the eye. Whether a photograph is a mere manual reproduction of subject-matter, or an original work of art, is a question of fact; and there is certainly sufficient evidence in the present record to
75 justify if not to compel the conclusion that the one in question embodies an exceptional degree of artistic conception and expression. It required the photographer to select and utilize the best effects of light, cloud, water and general surroundings and combine them under favorable conditions for depicting vividly and accurately the view of a yacht under sail. Whether the notice was

legibly inscribed upon the copies was also a question of fact for the jury.

The judgment is reversed.

George E. Waldo, for the plaintiff in error.
John R. Abney, for the defendant in error.

A true copy of opinion in first case, upon which the following memorandum was based in second case: "Judgment affirmed on opinion filed on former decision."

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk*.

76 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between Charles E. Bolles, plaintiff in error, and The Outing Company, Limited, defendant in error, a manifest error hath happened, to the great damage of the said Charles E. Bolles, plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 28th day of February, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
R. W. PECKHAM,
Asso. Justice of the Supreme Court of the United States.

Washington, Feb'y 28, '98.

[Endorsed:] United States circuit court of appeals, second circuit. Filed Mar. 7, 1898. William Parkin, clerk.

Endorsed on cover: Case No. 16,817. U. S. C. C. of appeals, 2nd circuit. Term No., 604. Charles E. Bolles, plaintiff in error, *vs.* The Outing Company (Limited). Filed March 11, 1898.

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